U.S. Department of Justice

Immigration and Naturalization Service

B6

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 02 041 51587 Office: California Service Center Date: JAN 14 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a gem cutter. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the priority date of the visa petition, and denied the petition.

On appeal, counsel submits additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the labor certification is $16.22 per hour or $33,737.60 per annum.

Counsel submitted copies of the petitioner's 1998 through 2000 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's 1998 Form 1040 reflected an adjusted gross income of -$7,092. Schedule C reflected gross receipts of $602,003; gross profit of $591,624; wages of $14,200; and a net profit of $7,187. The petitioner's 1999 Form 1040 reflected an adjusted gross income of $7,135.

Schedule C reflected gross receipts of $698,022; gross profit of $655,051; wages of $0; and a net profit of $12,870.

The petitioner's 2000 Form 1040 reflected an adjusted gross income of $17,012. Schedule C reflected gross receipts of $875,528; gross profit of $862,230; wages of $0; and a net profit of $5,941.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel stated that the petitioner owns a house which he purchased in 1999 for $450,000 and which is now valued at $550,000. Counsel stated that the mortgage on the property is approximately $350,000, and that the petitioner is able to sell or to refinance that house as necessary to pay the beneficiary.

In support of those assertions, counsel provided a form appraisal of the house and a reproduction of a real estate data company's information sheet pertinent to the property. The appraisal does, in fact, show an appraiser's estimate of that property's value as $550,000. The information sheet states that the property sold on December 1, 1999 for $405,000. We presume that the discrepancy between that reported sale price and the sale price reported by counsel is a typographical error. In any event, that discrepancy is unimportant to our determination today.

That information sheet also indicates that, at the time that it was produced, sometime after December 1, 1999, the property was held subject to a first mortgage of $364,500. The information sheet does not mention any other mortgages on the property. Whether the property has been further encumbered since that sheet was produced is unknown.

However, that information sheet does not indicate that the petitioner is the owner of the house, but, rather, a co-owner of it. Counsel provided no evidence that the petitioner could obtain a mortgage on his undivided interest in the house. Counsel provided no evidence that the other co-owner would agree either to sell the property or to refinance and "cash out" in order to pay the beneficiary's salary.

Further, that property was purchased on December 1, 1999. Even if ownership of that house were evidence of ability to pay the beneficiary's salary since that date, it is not evidence of the ability to pay the beneficiary's salary from January 12, 1998 through December 1, 1999. Although the difference between the purchase price of that property and the reported mortgage debt owed appears to indicate a substantial down payment, the source of that down payment is unknown.

Based on the evidence submitted, the petitioner has failed to demonstrate that he had sufficient funds available to pay the

beneficiary the proffered wage as of the priority date of the visa petition as required by 8 C.F.R. 204.5(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.